Ramatex Textiles Industrial Sdn Bhd & Anor v Hong Leong Assurance Bhd

HIGH COURT (MUAR) — CIVIL SUIT NO 23–57 OF 2003
UMI KALTHUM JC
29 NOVEMBER 2010

Civil Procedure — Action — Disposal of action without trial — Disposal of case on points of law — Claims under marine insurance policy — Whether plaintiffs had title to commence present suit against defendant insurer — Whether plaintiffs had title over consignment after shipment — Whether storage of consignment in consignee's forwarder's yard constituted 'in the course of transit' within cl 8.1.2 of the Institute Cargo Clauses (A)1.1.82 — Whether contract of insurance had terminated when consignments were left at consignee's forwarder's yard

Insurance — Marine insurance — Shipment of consignments to Phnom Penh — Warehouse to warehouse insurance cover — Goods arrived safely at port of discharge but were stolen while stored in consignee's freight forwarder's yard — Whether plaintiffs had title over consignment after shipment — Whether storage of consignment in consignee's forwarder's yard constituted 'in the course of transit' within cl 8.1.2 of the Institute Cargo Clauses (A)1.1.82 — Whether contract of insurance had terminated when consignments were left at consignee's forwarder's yard

Words and Phrases — Definition of 'free on board' — Trade term

The first plaintiff sent a consignment of clothing and fabric to June Textiles Co Ltd ('the consignee') at Phnom Penh, Cambodia by sea vide containers. The consignment was insured with the defendant company. Gimmil Industrial (M) Sdn Bhd ('the second plaintiff') also sent a similar consignment to the consignee by sea, and the said consignment was also insured by the defendant. The defendant had provided a 'warehouse to warehouse' insurance cover for the two consignments, which meant that the two consignments were insured from the time they left the plaintiffs' premises till they arrived at the consignee's premises in Phnom Penh. After the consignments arrived safely at the port of discharge in Phnom Penh and while they were stored at the consignee's forwarder's yard en route to the consignee's premises they were looted by unknown thieves. The consignee did not pay the plaintiffs because it claimed it had had never received any of the consignments. The plaintiffs who had suffered loss by reason of the lost consignments made claims against the

defendant under the marine insurance policies. When the defendant repudiated liability the plaintiffs filed a suit against the defendant as insurer for the insured loss. The defendant then filed an application under O 18 r 19 of the Rules of the High Court 1980 ('RHC') to strike out the plaintiffs' claim on the grounds that the plaintiffs had no title to commence an action against the defendant as insurer. However, the parities agreed to hold that application and proceed with the present joint application under O 14A of the RHC, to determine whether plaintiffs had the title to commence the present suit against the defendant; whether the storage of the consignment at the consignee's forwarder's yard on the instructions of the consignee constituted 'in the course of transit' within the meaning of cl 8.1.2 of the Institute Cargo Clauses (A)1.1.82 ('the ICC'); and whether the contract of insurance had terminated when the consignments were left at the consignee's freight forwarder's yard.

Held, dismissing the plaintiffs' claim with costs:

(1) The documentary evidence adduced by the plaintiffs failed to lend credence to what they had averred in their affidavits. Based on the evidence it was found that the sales contracts between the plaintiffs and the consignee were on FOB terms. The abbreviation FOB or free on board was defined as a trade term used in international sales contracts. In FOB contracts, the seller was obligated to have the goods packaged and ready for shipment from an agreed point and the buyer normally assumed the burden of all inland transportation costs and risks in the exporting country, as well as all subsequent transportation costs. Since the sales contracts in the instant case were on a FOB basis it followed that the risk passed to the consignee upon shipment of the goods and that the plaintiffs did not have title over the goods thereafter. As such, the plaintiffs had no insurable interest to commence the present claim against the defendant. Further, at the time of the loss the goods were at the consignee's freight forwarder's yard (see para 5(a), 5(a)(ii), (b), (d) & (e)).

(2) The consignments were stored in the consignee's freight forwarder's yard upon the consignee's instructions and for the consignee's own convenience. This meant that the 'ordinary course of transit' had thereby been interrupted and the insurance policies had come to an end by virtue of cll 8.1.2 and 8.1.2.1 of the ICC. It thus followed that the contract of insurance would have been terminated upon the said consignments being deposited at the consignee's freight forwarder's yard (see paras 9 & 11).

[Bahasa Malaysia summary

Plaintif pertama menghantar pengkonsainan pakaian dan kain kepada June Textiles Co Ltd ('penerima konsain') di Phnom Penh, Cambodia menggunakan pengangkutan laut dengan kontena. Pengkonsainan tersebut diinsuranskan dengan syarikat defendan. Gimmil Industrial (M) Sdn Bhd

('plaintif kedua') juga menghantar pengkonsainan yang sama kepada penerima konsain melalui laut, dan pengkonsainan tersebut juga diinsuranskan dengan defendan. Defendan telah memperuntukkan lindungan insurans 'warehouse to warehouse' untuk kedua-dua pengkonsainan tersebut, yang bermaksud bahawa kedua-dua pengkonsainan tersebut diinsuranskan dari masa ia meninggalkan premis-premis plaintif sehingga ia sampai ke premis-premis penerima konsain di Phnom Penh. Selepas pengkonsainan tiba dengan selamat di pelabuhan pemunggahan kargo di Phnom Penh dan semasa ianya disimpan di limbungan penghantar penerima konsain dalam perjalananan ke premis penerima konsain ianya dirampas oleh perompak-perompak yang tidak dikenali. Penerima konsain tidak membayar plaintif-plaintif kerana ia mendakwa yang ianya tidak pernah menerima apa-apa daripada pengkonsainan tersebut. Plaintif-plaintif yang mengalami kerugian atas sebab kehilangan pengkonsainan tersebut membuat tuntutan terhadap defendan di bawah polisi insurans marin. Apabila defendan tidak mengaku liabiliti plaintif-plaintif memfailkan tindakan terhadap defendan sebagai penanggung insurans untuk kerugian yang diinsuranskan. Defendan kemudiannya memfailkan permohonan di bawah A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk membatalkan tuntutan plaintif-plaintif atas alasan bahawa plaintif-plaintif tidak mempunyai hak untuk memulakan tindakan terhadap defendan sebagai penanggung insurans. Walau bagaimanapun pihak-pihak bersetuju untuk menangguhkan permohonan tersebut dan meneruskan dengan permohonan bersama ini di bawah A 14A KMT, untuk menentukan sama ada plaintif-plaintif mempunyai hak untuk memulakan tindakan ini terhadap defendan; sama ada penyimpanan pengkosainan tersebut di limbungan penghantar penerima konsain atas arahan-arahan penerima konsain membentuk 'in the course of transit' dalam maksud klausa 8.1.2 Institute Cargo Clauses (A)1.1.82 ('ICC'); dan sama ada kontrak insurans telah ditamatkan apabila pengkonsainan tersebut ditinggalkan di limbungan penghantar angkutan penerima konsain.

Diputuskan, menolak tuntutan plaintif-plaintif dengan kos:

(1) Keterangan dokumentar yang dikemukakan oleh plaintif-plaintif gagal untuk membuktikan kebenaran terhadap apa yang mereka tegaskan di dalam afidavit-afidavit mereka. Berdasarkan keterangan ia didapati bahawa kontrak jualan di antara plaintif-plaintif dan penerima konsain adalah atas terma FOB. Penyingkatan FOB atau free on board ('percuma ke atas kapal') didefinasikan sebagai terma perniagaan yang digunakan di dalam kontrak-kontrak jualan antarabangsa. Dalam kontrak-kontrak FOB, penjual adalah wajib untuk membungkus barang-barang dan sedia untuk penghantaran dari poin yang dipersetujui dan pembeli selalunya menanggung beban kesemua kos pengangkutan dalam negeri dan risiko dalam negeri yang mengekspot, dan juga kesemua kos pengangkutan selanjutnya. Memandangkan kontrak-kontrak jualan dalam kes ini

adalah atas asas FOB oleh itu risiko beralih kepada penerima konsain atas penghantaran barang-barang dan bahawa plaintif-plaintif tidak mempunyai hak ke atas barang-barang tersebut. Oleh itu, plaintif-plaintif tidak mempunyai kepentingan insurans untuk memulakan tuntutan ini terhadap defendan. Selanjutnya, pada masa kehilangan barang-barang tersebut berada di limbungan penghantar angkut penerima konsain (lihat perenggan 5(a), 5(a)(ii), (b), (d) & (e)).

(2) Pengkonsainan disimpan di limbungan penghantar angkut penerima konsain atas arahan-arahan penerima konsain dan untuk kesenangan penerima konsain sendiri. Ini bermaksud bahawa 'ordinary course of transit' oleh itu telah diganggu dan polisi insurans telah tamat berikutan klausa 8.1.2 dan 8.1.2.1 ICC. Oleh itu kontrak insurans akan berakhir selepas pengkonsainan tersebut disimpan di limbungan penghantar angkut penerima konsain (lihat perenggan 9 & 11).]

Notes

For cases on disposal of action without trial, see 2(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 139–168.

For cases on marine insurance generally, see 8(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 219–274.

Cases referred to

SCA (Freight) Ltd v Gibson [1974] 2 Lloyd's Rep 533 (refd)
Verna Trading Pty Ltd v New India Assurance Co Ltd [1991] 1 VR 129 (refd)

Legislation referred to

Civil Law Act 1957 s 5
Marine Insurance Act 1906 [UK] s 48
Rules of the High Court 1980 O 14A, O 18 r 19
Sales of Goods Act 1957 s 26

L Nagarajan (Gulam & Wong) for the plaintiffs.
Kathryn Leong (LY Leong & Partners) for the defendant.

Umi Kalthum JC:

THE APPLICATION

[1] This is a joint application by the plaintiffs and the defendant in encl 49 to refer questions to the court for determination under O 14A of the Rules of the High Court 1980 ('RHC') as follows:

(a) whether or not the storage of the containers at the consignee's forwarder's yard (Foo Eng Cambodia Import-Export and Transportation Co Ltd

('Foo Eng')) was for 'storage other than in the ordinary course of transit' within the meaning of cl 8.1.2 of the Institute Cargo Clauses ('ICC') (A)1/1/82;

(b) whether the contract of insurance had terminated when the containers were left at the consignee's forwarder's yard (Foo Eng) pursuant to cl 8 of ICC(A); and

(c) whether the plaintiffs have title to bring this action?

THE FACTS

[2] The first plaintiff sent a consignment of clothing and fabric to June Textiles Co Ltd at Phnom Penh, Cambodia ('June Textiles') by sea vide containers. The consignment was insured by seven marine policies of the defendant. The second plaintiff also sent a consignment of clothing and fabric to June Textiles in a similar manner and the same was insured by the defendant vide three marine policies. The insurance cover was for 'warehouse to warehouse', that is, from the plaintiffs' premises in Batu Pahat to the consignee's premises in Phnom Penh. The consignments arrived safely at the port of discharge in Sihanoukville Port, Phnom Penh, Cambodia and was sent by land to be delivered to the consignee. It was then kept at the consignee's forwarder's yard en route to the consignee's premises. However, on 5 and 6 July 1997 during civil riots in Phnom Penh, the entire consignment was looted by unknown thieves. The plaintiffs suffered loss by reason of the lost consignments and made claims against the defendant under the marine policies. The consignee never paid the plaintiffs since it never received any of the consignments. The plaintiffs filed this suit against the defendant as insurer for the insured loss.

[3] Before this application was made, the defendant had filed an application under O 18 r 19 of the RHC ('O 18 application') to strike out the plaintiffs' claim by reason of the plaintiffs being alleged to have no title to bring this action. The O 18 application was agreed to be kept on hold whilst this application was agreed to be made without a trial being conducted. Both parties relied on all the affidavits filed in the O 18 application, the common bundle of documents as well as the agreed facts for the purposes of this O 14A proceedings.

[4] It was agreed by the parties that the coverage of insurance for all the said marine cargo policies was subject to the Institute Cargo Clauses (A) 1.1.82,

Institute War Clauses (Cargo) 1.1.82 and Institute Strikes Clauses (Cargo) 1.1.82 and such coverage was subject to an excess of 0.25 % on the total insured value.

QUESTION (C) — WHETHER THE PLAINTIFFS HAVE TITLE TO BRING ACTION

[5] This question needs to be dealt with first as it would determine the other two questions posed. I answer the question in the negative, for the following reasons:

(a) The plaintiffs failed to exhibit the sales contract between the plaintiffs and June Textiles to lend credence to what they had averred in their affidavits. What is left is documentary evidence which the plaintiffs themselves had forwarded to the defendant when first making their claims. Based on the:

(i) SGS report of findings, being the plaintiffs' own documents and found on pp 6, 10, 14–15, 21–25, 29–30, 38, 42–43, 47–48 and 52–53 ('SGS report') of the common bundle of documents;

(ii) the combined transport bills of lading found on pp 2, 8, 12, 17, 27, 32, 36, 40, 45 and 50 ('bills of lading') of the common bundle of documents, I agree with the submission of learned counsel for the defendant that the sales contract between the plaintiffs and June Textiles was on a FOB terms. The SGS report shows the FOB prices of all the imported goods by June Textiles, where the import duty and consumption tax were paid by June Textiles, the consignee, and who was named as the 'Importer' in the form. The bills of lading merely stated 'Laden On Board'. The goods were consigned to June Textiles under the column 'Consignee' and June Textiles was the party referred to under the column 'Notify Party' in the bills of lading.

(b) The term 'FOB' has been defined in the *Dictionary of International Trade* by Edward G Hinkelman as:

> *FOB*
>
> (trade term) An abbreviation used in some international sales contracts, when imports are valued at a designated point, as agreed between buyer and seller, that is considered 'Free on Board'. In such contract, the seller is obligated to have the goods packaged and ready for shipment from the agreed point, whether his own place of business or some intermediate

> point, *and the buyer normally assumes the burden of all inland transportation costs and risks in the exporting country, as well as all subsequent transportation costs, including the costs of loading the merchandise on the vessel*. However, if the contract stipulates 'FOB Vessel' the seller bears all transporation costs to the vessel named by the buyer, as well as the costs of loading the goods on to that vessel …
>
> (Emphasis added.)

(c) I also agree with the submission of learned counsel for the defendant that based on the bills of lading, the plaintiffs did not reserve their rights of disposal of the goods. As stated earlier, the bills of lading merely stated 'Laden on Board', whilst the SGS report stated clearly 'FOB USD'. Nowhere in these documents, let alone in the documents exhibited by the plaintiffs which show that the sales contract between the plaintiffs and June Textiles was on a 'FOB Destination' contract as submitted by learned counsel for the plaintiffs so as to enable the plaintiffs to retain title to the goods.

(d) Since I find the sales contract was on a FOB basis, it follows that the risk passed to June Textiles upon shipment of the goods, and that the plaintiffs thereafter do not have tittle over the goods and therefore no insurable interest to bring the present claim against the defendant. Section 26 of the Sales of Goods Act 1957 ('SOGA') applies to this case. Section 26 provides:

> 26 Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not …

(e) Moreover, at the time of the loss, the goods were at the consignee's freight forwarder's yard, as instructed by June Textiles/the consignee to its freight forwarder, Foo Eng, and as proved in exhs LSP1 and LSP2 of the defendant's affidavit in reply, encl 41. In exh LSP2, Foo Eng had stated in its letter that:

> The containers belong to JUNE TEXTILES CO. LTD. (JTL) as a consignee.

[6] With the answer to question (c) being answered, I need not go further to answer questions (a) and (b). But for completenes, I will consider them together as they are interlinked.

QUESTION (A) — WHETHER OR NOT THE STORAGE OF THE CONTAINERS AT THE CONSIGNEE'S FORWARDER'S YARD (FOO ENG) WAS FOR 'STORAGE OTHER THAN IN THE ORDINARY COURSE OF TRANSIT' WITHIN THE MEANING OF CLAUSE 8.1.2 OF THE ICC(A)1/1/82

QUESTION (B) — WHETHER THE CONTRACT OF INSURANCE HAD TERMINATED WHEN THE CONTAINERS WERE LEFT AT THE CONSIGNEE'S FORWARDER'S YARD (FOO ENG) PURSUANT TO CLAUSE 8 OF ICC(A)

[7] Clause 8.1 of the ICC(A) provides as follows:

> This insurance attaches from the time the goods leave the warehouse or place of storage at the place named herein for the commencement of the transit, continues during the ordinary course of transit and terminates either,
>
> 8.1.1 on delivery to the Consignees' or other final warehouse or place of storage at the destination named herein
>
> 8.1.2 on delivery to any other warehouse or place of storage, whether prior to or at the destination named herein, which the Assured elect to use tiher,
>
> 8.1.2.1 for storage other than in the ordinary course of transit or
>
> 8.1.2.2 for allocation or distribution, or
>
> 8.1.3 on the expiry of 60 days after completion of discharge overside of the goods hereby insured from the oversea vessel at the final port of discharge, whichever shall first occur.

[8] The first question really relates to the question of whether the placement of the containers at June Textiles' forwarder Foo Eng's yard at Phnom Penh on the instructions of June Textiles constitutes 'in the ordinary course of transit' within the meaning of cl 8.1.2 of the ICC(A)1/1/82. The letter from June Textiles dated 5 June 1997 to Foo Eng in exh LSP1, encl 41 states as follows:

> Re: *Instruction to delay and slow-down port clearance on incoming containers shipment from Malaysia and Singapore.*
>
> With reference from the above, we wish to inform you that due to heavy month — end export and stuffing of garments into the containers parked at our premise for the next few weeks. There was a space limitation problem at the factory premise. The logistic problem was even worst with the new factory under construction which you are fuly aware.

> At such we hereby instructed you to slow down and delay port clearance for all incoming containers within the period of time from 9th June, 1997 until 14th. July, 1997...

[9] In view of the said letter, June Textiles had stored the containers at its forwarder's yard for its own convenience as it was experiencing space limitation in its own factory and at the same time was waiting for its new factory to be completed. I therefore agree with submission of learned counsel for the defendant that the 'ordinary course of transit' had thereby been interrupted and insurance policies had come to an end by virtue of cl 8.1.2 and cl 8.1.2.1. Section 48 of the English Marine Insurance Act 1906 ('MIA'), which is the applicable law in Malaysia by virtue of s 5 of the Civil Law Act 1957, further provides as follows:

> 48 Delay in voyage
>
> In the case of a voyage policy, *the adventure insured must be prosecuted throughout its course with reasonable dispatch, and, if without lawful excuse it is not so prosecuted, the insurer is discharged from liability* as from the time when the delay became unreasonable.
>
> (Emphasis added.)

[10] I therefore answer the first question in positive. I find the cases referred to by learned counsel for the defendant on this issue as being relevant. They are *Verna Trading Pty Ltd v New India Assurance Co Ltd* [1991] 1 VR 129 (Supreme Court of Victoria); *SCA (Freight) Ltd v Gibson* [1974] 2 Lloyd's Rep 533.

[11] It follows from my answer to question (a) that my answer to question (b) must also be in the positive. The contract of insurance would have been terminated upon the containers being deposited at Foo Eng's yard on or about 20 June 1997 to 4 July 1997 (see p 66, common bundle of documents, encl 53).

CONCLUSION

[12] For the reasons stated above I answer:

(a) question (a), in the positive;

(b) question (b), in the positive;

(c) question (c), in the negative.

[13] Additionally, in view of my answers to the questions posed, I find that the plaintiffs' claim against the defendant cannot be sustained and I dismiss the plaintiffs' claim with costs at RM10,000.

Plaintiffs' claim dismissed with costs.

Reported by Kohila Nesan